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Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

REMON LEE, Petitioner,

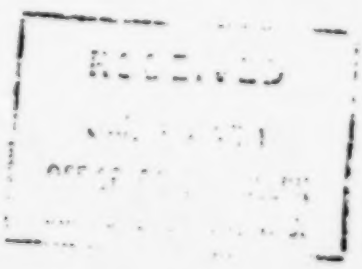
Vs.

MIKE KEMNA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

REMON LEE
#167441
1115 EAST PENCE RD.
CAMERON, MO 64429-8804



12 pp

QUESTION(S) PRESENTED

1). DID THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERR BY AFFIRMING THE DISTRICT COURT'S DENIAL OF LEE'S PETITION FOR HABEAS CORPUS BECAUSE HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GRANT HIM A 19 HOUR CONTINUANCE TO CONTACT HIS THREE SUBPOENAED ALIBI WITNESSES WHO UNEXPECTEDLY DID NOT RETURN AFTER A LUNCH BREAK?

2). SHOULD A HEARING HAVE BEEN HELD ON THE HABEAS CORPUS TO AT LEAST CONSIDER THE TESTIMONY OF THE ALIBI WITNESSES TO THE EFFECT THAT THEY WERE TOLD BY A COURT PERSONNEL, TO LEAVE?

3). IN THE CIRCUMSTANCES IN REMON LEE'S CASE, WAS HIS FEDERAL VIOLATION REGARDING A DENIED REQUEST FOR A SHORT CONTINUANCE, PROCEDURALLY BARRED FROM FEDERAL COURT?

4). HAS REMON LEE MADE A SUBSTANTIAL SHOWING OF ACTUAL INNOCENCE ACCORDING TO THE **SCHLUP** STANDARD FOR HIS ALIBI WITNESSES TO BE EXPLORED FURTHER TO PREVENT A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED	iii
TABLE OF AUTHORITIES CITED	iv
ARGUMENT	1
CONCLUSION	5

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution reads in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime....[and] be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment of the United States Constitution reads in relevant part:

> No State shall....deprive any person of life, liberty, or property, without due process of law.

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

YLST V. NUNNEMAKER, 501 U.S. 797 (1991).....2

DAVIS V. WECHSLER, 263 U.S. 22 (1923).....2

SMART V. SCULLY, 787 F.2d 816 (2nd Cir. 1986).....2

CHRISTOFFEL V. U.S., 190 F.2d 585 (D.C. Cir. 1986).....2

SCHLUP V. DELO, 513 U.S. 298 (1995).....3

REASONOVER V. WASHINGTON, No. 4:96-CV-1477, Eastern District of Missouri, August 2, 1999).....3

RULES

Mo. R. 24.09.....1

Mo. R. 24.10.....1

STATUTES

28 U.S. 2254(d)(1)(2).....2

ARGUMENT

The Petitioner believes that in all actuality, his Constitutional claim is not procedurally barred. (See Certioran petition at 9 - 11). The Missouri Courts as of yet, have not decided on whether or not a defendant who fails to meet the written requirements of **Rules 24.09 and 24.10**, must still meet the written requirements when his witnesses suddenly and without reason, disappear from the courthouse in the middle of trial. Every case used thus far to deny the Petitioner's claim, did not deal with this. Instead, they each dealt with counsel failing to call witnesses or where counsel knew ahead of time that witnesses were missing but failed to set the motion for continuance in writing.

In the Petitioner's case, he was represented by counsel who did the only thing a lawyer could do faced with the "sudden" and "unexplained" disappearance of three alibi witnesses----- he made an oral motion for continuance on the record and informed the court of the facts known to him and the defendant. If trial counsel had not made the oral motion, the trial would have continued immediately. There was no time to type the motion along with an affidavit from the Petitioner to satisfy the requirements of Rules 24.09 and 24.10. Further, on the record, the trial judge gave his specific reasons why he denied the motion for continuance and they had nothing to do with failing to meet the requirements of a rule. (See Certiorari petition, page 10). Thus, the Missouri Court of Appeals' decision to deny

based on Rules 24.09 and 24.10 was based on an unreasonable determination of the facts of the case, which entitles the Petitioner to federal habeas corpus relief. **28 U.S.C. 2254 (d)(1)(2).**

The Respondent insists that the decisions by the lower courts do not conflict with this Court's holding in **Ylst v. Nunnemaker**, 501 U.S. 797 (1991). The lower courts found Petitioner Lee's due process claim procedurally barred. However, the Missouri Court of Appeals did decide in its opinion that the due process claim was meritless. It is impossible to rule a claim meritless unless the merits of that claim are considered. **Ylst** clearly teaches that when a state court reaches the merits, it "removes" any procedural bar to federal court review.

Therefore, the lower court's decision is in direct conflict with this Court's holding in **Ylst**.

The Respondent objects to Petitioner's use of **Davis v. Wechsler**, 263 U.S. 22 (1923), **Smart v. Scully**, 787 F.2d 816, 820 (2nd Cir. 1986); and **Christoffel v. U.S.**, 190 F.2d 585, 594 (D.C. Cir. 1950), (Respondent's brief at 3 - 4). The Petitioner will refer the Court to his Petition For Writ of Certiorari, pages 11 - 12, for his use of these cases, also to the dissenting opinion in the Eighth Circuit. (See Appendix A, of Petition).

The Respondent alleges there is no conflict with the lower courts' opinions regarding Lee's actual innocence, with the

Schlup case of this Court. (Respondent's Brief at 3). The fact is, the Eighth Circuit has adopted a criteria for actual innocence NOT set out by this Court in **Schlup v. Delo**, 513 U.S. 298 (1995), (See Certiorari Petition, pages 12 - 13). The lower courts' interpretation of Schlup conflicts with the very language of Schlup itself. Therefore, the Petitioner's actual innocence showing has not been properly analysed under the Schlup standard. The Petitioner refers the Court to **Reasonover v. Washington**, No. 4:96-CV-1477, U.S. District Court, eastern District of Missouri, August 2, 1999, Slip Opinion, pages 10-17. The Reasonover opinion is a correct interpretation of this Court's wording in Schlup.

Basically, the Eighth Circuit's interpretation excludes all evidence of innocence that was available at the time of trial. This Court, in Schlup dictated that federal courts consider "all" the evidence brought by the Petitioner. **Id.**, 513 U.S. at 328. In fact this Court provided that a Petitioner produce new reliable evidence that was "not presented at trial." **Id.** at 324.

Thus, even assuming the Petitioner's due process claim is indeed procedurally barred, his evidence of "actual innocence" has not been properly tested under Schlup, which could raise the procedural bar and allow federal review of the Constitutional claim.

The Petitioner begs this Court's granting of a Writ of Certiorari to resolve the conflict between the lower courts and

this Court regarding "actual innocence" under Schlup.

CONCLUSION

The Petitioner asks for the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

REMON LEE
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1115 East Pence Road
Cameron, Missouri 64429

PROOF OF SERVICE

I declare pursuant to 28 U.S.C. 1746 under the penalty of perjury that on this 12th day of August, 2001, I have deposited a true copy of the enclosed Reply Brief, first-class, postage prepaid, into the prison's internal mailing box, addressed to the Respondent's attorney, Mr. Michael Spillane, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

REMON LEE

01-12-2001

Supreme Court of the United States
Office of the Clerk
William K. Suter
1 First Street, N.E.
Washington, D.C. 20543

Re: Lee v. Kemna, No. 00-6933

Dear Mr. Clerk:

Enclosed please find a Reply Brief in response to the Respondent's attorney's response to the Court's Order. This Reply Brief is submitted pursuant to Supreme Court Rules 17.5, 33.1(g)(iii), 24.4, 39, and a Proof of Service is enclosed pursuant to Rule 29.

Please file and present these documents to the Justices immediately.

Sincerely,

Remon Lee

Remon Lee
#167441
1115 East Pence Road
Cameron, Missouri 64429

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